UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

JBM, INC., d/b/a BLUEGRASS SATELLITE[1]
Employer

and Case 25-RC-10327

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 135
Petitioner

and

THE PRODUCTION WORKERS UNION,
LOCAL 707, NPW
Intervenor

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

On January 26, 2006, the International Brotherhood of Teamsters, Local 135 (the "Petitioner"), filed a petition under Section 9(c) of the Act in the above captioned matter. The Petitioner sought to represent certain employees of JBM, Inc., d/b/a Bluegrass Satellite (the "Employer") at its Indianapolis, Indiana facility. The Employer maintained the only appropriate unit was a multi-facility unit, which included fourteen facilities in Illinois, Indiana, Iowa, Kentucky, and Ohio,[2] comprised of all head area technicians, working team leaders, technicians, clerks, and trainers. The Petitioner contended that head area technicians and working team leaders were supervisory employees within the meaning of Section 2(11) of the Act and should be excluded from the unit. Thereafter, a hearing was held February 13, 2006, before a hearing office of the National Labor Relations Board, to determine the appropriate unit for collective bargaining. On March 10, 2006, a Decision issued, in which the undersigned concluded that no compelling circumstances existed which warranted disturbing the established multi-facility bargaining history between the Employer and The Production Workers Union, Local 707, NPW (the "Intervenor") and, therefore, the following employees of the Employer constituted a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

[1] The name of the Employer appears as amended at the February 13, 2006, hearing.

[2] The relevant warehouse facilities are in Illinois (1)—Bloomington; Indiana (2)—Evansville and Indianapolis; Iowa (1)—Davenport; Kentucky (4)—Elizabethtown, Lexington, London and Louisville; and Ohio (6)—Cincinnati, Cleveland East, Cleveland West, Edison, Wilmington, and Youngstown.

> All full-time and regular part-time technicians, trainers, and clerks employed by the Employer at all its Illinois, Indiana, Iowa, Kentucky, and Ohio facilities (excluding the Columbus, Ohio facility); BUT EXCLUDING all sales employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

Based upon the evidence adduced at the prior hearing, it was not possible to determine the 2(11) supervisory status of the head area technicians and the working team leaders. As a result, the March 10, 2006 Decision indicated that should the Petitioner elect to proceed to an election in the larger multi-facility unit and upon a sufficient showing of interest the record would be re-opened in order to receive additional evidence as to the 2(11) status of the head area technicians and working team leaders. No party requested review of the unit determination contained in the March 10, 2006 Decision, however, the Employer and Intervenor filed Special Appeals with the Board concerning the time allowed the Petitioner to submit a sufficient showing of interest in the expanded unit. These appeals were denied by the Board on May 8, 2006. On May 16, 2006, the undersigned issued an Order Reopening Hearing And Notice Of Hearing for the limited purpose of receiving additional evidence regarding the 2(11) status of the head area technicians and working team leaders at all facilities which comprise the unit found appropriate. The hearing was held on June 1, 2006, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.[3]

I. ISSUES

The Petitioner seeks to exclude from the unit found appropriate all head area technicians (hereafter referred to as "HATs") and working team leaders (hereafter referred to as "WTLs"). The Petitioner contends that HATs and WTLs are supervisory employees within the meaning of Section 2(11) of the Act. The Employer has also taken the position that both the HATs and the WTLs possess and have, in the interest of the Employer, within the past 12 months, exercised authority that comports with Section 2(11) of the Act. The Intervenor, however, maintains that there is insufficient evidence of 2(11) status to remove the HATs and WTLs from the established bargaining unit. There are approximately 9 HATs and 40 WTLs at the Employer's facilities found to be included in the appropriate unit.[4]

II. DECISION

For the reasons discussed in detail below, it is concluded that both the HATs and WTLs possess and exercise sufficient indicia of supervisory status that they are supervisors, as contemplated under Section 2(11) of the Act. As such, they must be excluded from the unit

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[3] Upon the entire record in this proceeding, the undersigned finds that the hearing officer's rulings made at the hearing are free from error and are hereby affirmed.

[4] In Board Exhibit 3(e), the parties stipulated that all HATs are invested with and exercise the same duties, responsibilities and authorities and thus should be treated alike with respect to the determination of supervisory status. The parties further stipulated that all WTLs are invested with and exercise the same duties, responsibilities, and authorities and thus should be treated alike with respect to the determination of supervisory status.

found to be appropriate in this matter. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time technicians, trainers, and clerks employed by the Employer at all its Illinois, Indiana, Iowa, Kentucky, and Ohio facilities (excluding the Columbus, Ohio facility); BUT EXCLUDING all sales employees, professional employees, guards and supervisors, including head area technicians and working team leaders, as defined in the Act, and all other employees.

III. DISCUSSION

As previously discussed in the March 10, 2006 Decision, the Employer's facilities are divided into two regions—east and west. According to the Employer's organizational structure, two Area Managers are ultimately responsible for all of the Employer's facilities. In addition, the Employer employs 9 head area technicians and 40 working team leaders at the facilities found to be included in the appropriate unit.

A. The Law Concerning Supervisory Status

To determine whether an individual is a supervisor within the meaning of Section 2(11) of the Act, the Board examines: (1) whether the individual has the authority to engage in any one of the twelve enumerated powers listed in Section 2(11) of the Act and (2) whether the exercise of such authority requires the use of independent judgment. NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001); NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 573-574 (1994). The twelve powers set forth in the definition of a supervisor in Section 2(11) of the Act are the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly direct them, or to adjust their grievances, or effectively recommend such action."

The burden of proof regarding an individual's supervisory status rests upon the party alleging that an individual is a supervisor. Kentucky River, 532 U.S. 706 (2001); Bennett Industries, 313 NLRB 1363 (1994). A lack of evidence is construed against the party asserting supervisory status. The Board is reluctant to confer supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. Vencor Hospital–Los Angeles, 328 NLRB 1136, 1138 (1999). The Board has found that a particular indicia of supervisory status has not been established if the evidence is in conflict or otherwise inconclusive regarding that indicia. Phelps Community Medical Center, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears Roebuck & Co., 304 NLRB 193 (1991).

B. HATs

At the outset of the hearing, all parties stipulated as set forth in Joint Exhibit 1, that the HATs possess and exercise the following authorities: hire, transfer (both temporary and permanent), discipline and/or effectively recommend discipline, effectively recommend promotion of employees, and the authority to grant time off to employees. In addition the parties stipulated that the HATs have performed the aforementioned authorities, using independent judgment and in the interest of the Employer during the past twelve-months.

As evidenced by Joint Exhibit No. 1, the parties have stipulated that the HATs exercise, on a regular and consistent basis, authorities which are consistent with those required for a finding of 2(11) supervisory status. In addition, sworn testimony adduced at hearing, provided specific examples of the exercise of such authority. HAT Sam Brooks testified that he has the authority to transfer technicians from one team to another, hire new technicians, and grant time off. He has the authority to perform these duties without obtaining approval from his Area Manager. In addition, HATs routinely issue, or direct WTL's to issue, written and verbal warnings to subordinate employees.

The Employer maintains a progressive disciplinary procedure. As part of this procedure the Employer issues disciplinary memos to document both verbal and written warnings. These disciplinary memos are placed in employees' personnel files. These disciplinary memos are issued from the Employer's Maysville, KY headquarters and indicate that they are from an area manager. The memo, however, can be requested by either a HAT or WTL. Once the disciplinary memo is prepared it is transmitted to the facility from which it was requested and is presented to the employee by a HAT or a WTL. The record reflects only one occasion when this request was not approved by an Area Manager. In that instance, the Area Manager decided to impose a more severe penalty than the one originally requested.

In addition, the job description for HATs was received into evidence and one of the essential duties listed in this job description is that he or she oversees hiring, training and recruiting. Each HAT supervises from 3 to 7 WTLs, an administrative assistant, and several warehouse employees. Head area technicians are paid a base salary and have the opportunity to earn bonuses.

In light of the parties stipulation and the record evidence, there is sufficient evidence for a finding that the HATs are 2(11) supervisors.

C. WTLs

The evidence adduced at hearing, demonstrates that the WTL position is responsible for the daily work assignments for the technicians. The job description of the WTL position was entered into evidence. Under the job summary portion of this document, the WTLs are to "Supervise the daily activities of assigned technicians and/or contractors."

Each WTL is responsible for the daily work assignments of technicians who are assigned to their teams. Depending on the size of the facility a WTL may have from 6-26 technicians on their team. Each WTL has a computer and each afternoon receives a list of the work that is to be completed by his or her team on the following day.[5] The WTL assigns the work, based on each technician's geographical location, skills, and experience. While the HAT may review the assignments, there is no evidence that any changes are made to the WTLs assignments. The WTL either e-mails or faxes each technician their assignment for the following day. The technicians are paid based on the number and type of installations performed. Therefore, the WTLs assignment of various installation jobs impacts the technicians' wage rates. In addition the WTLs may reassign or re-distribute work should a technician be unable to complete their assigned installation or fail to contact the warehouse at the start of the day. Based on this control of a technician's work assignments, WTLS exercise independent judgment in assigning work to the technicians. See Alter Barge Lines, 336 NLRB 1266 (2001).

As discussed above, disciplinary memos are issued to technicians from the Maysville, Kentucky facility under the name of an area manager. These disciplinary memos, however are usually generated at the request of either an HAT or WTL. The record indicates that there is no further investigation and upon the request by either an HAT or WTL a disciplinary memo is generated and forwarded to the facility for issuance to the technician. The record further contains evidence of several situations where a WTL requested and/or issued a disciplinary memo to a technician for various infractions. Additionally on several occasions a WTL actually presented and signed disciplinary memos indicating it had been presented to the technician.

For example, each technician is required to call in prior to 8:00 a.m. each morning. The failure of a technician to call in, as required, is the basis for a disciplinary memo. The record reflects instances where a WTL issued a disciplinary memo to a technician for failing to perform the required call-in. Exhibits received into evidence at hearing reflect at least two occasions, during the prior six months, where WTL James Martin issued disciplinary memos to technicians who failed to call in as required.

Each technician is also required to attend a weekly team meeting at the local facility. The meetings are to provide additional information and training to the technicians and, are generally run by their WTL. In addition, on these days, the technicians turn in their paperwork from the previous week and pick up enough equipment to last them until the next weekly meeting. A technician who fails to attend the weekly meeting or who arrives late may be disciplined. The record reflects instances of a WTL requesting and/or issuing disciplinary memos to technicians for absence from or tardiness to a weekly meeting. The evidence at hearing established that on, at least, two occasions, WTL Todd Duff issued disciplinary memos to technicians who failed to attend weekly team meetings and another to a technician who arrived late. Additionally, the record reflects instances of other WTLs requesting that such disciplinary memos issue.

The WTLs are also responsible for quality control of the technicians on their teams. The Employer requires that each WTL perform 10 quality control calls each week. During these calls the WTL goes to the site where a technician is actually working and reviews the work being

[5] Technicians are responsible for installing and repairing Direct TV systems at customer's homes. Each technician is located in the field and only comes to the local facility for weekly team meetings.

performed. The WTL evaluates the quality of the technician's work and records it on a form which is submitted to the Employer. The results of the quality control evaluations can result in a technician being disciplined, if the work is not up to quality standards. The record reflects instances where a WTL has requested and presented a disciplinary memo to a technician for poor quality work. For example: WTL Todd Duff issued two disciplinary memos to his technicians for failing quality control standards over the prior six months.

In addition, the record reflects other numerous incidences in which a WTL has issued or requested that a disciplinary memo be issued to a subordinate. By way of example, the record reflects that in the last six months, WTL Jason Frost has made two requests for discipline for members of his team. During the same approximate period, an unidentified WTL from the Davenport, Iowa facility also requested disciplinary memos issue to two of the technicians on his or her team.

The record evidence reflects that the aforementioned responsibilities are performed with minimal oversight and that WTL recommendations regarding discipline are routinely approved, without additional investigation or input from either the HATs or area managers. Indeed, the record evidence indicates that the WTLs may choose to request a disciplinary memo or not depending on the technician's conduct. This discretion is evidence of the use of independent judgment in the WTL's decision to request a disciplinary memo. This independent and effective initiation of disciplinary proceedings against the technicians evidence the supervisory status of WTLs under Section 2(11). Wilshire at Lakewood, 345 NLRB No. 80 (September 2005).

As to hiring decisions, there is evidence that the WTL is directly involved in the screening, interviewing, and hiring of technicians. The HAT assigned to the Indianapolis area testified that he routinely accepts the hiring recommendations of WTLs and, in fact, does not recall ever overruling such a recommendation. WTLs, like HATs, are paid a base salary as well as have the opportunity to earn bonuses.

As the parties seeking to exclude the WTLs as Section 2(11) supervisors, the burden is upon the Petitioner and the Employer to prove that they routinely perform at least one of the supervisory indicia. Here, the record is clear that the WTL position performs multiple indicia of supervisory status. These include the daily assignment of work to technicians, frequent evaluations of the quality of technician's work, discipline, and hiring of technicians. In addition, the record clearly establishes that these duties are performed on a regular basis and with independent judgment. Additionally, the record contains secondary indicia of supervisory status on the part of WTLs. The WTLs are the only other classification, other than the HATs which receive a salary and opportunity to earn bonuses. Further, if WTLs were found not to be supervisors within the meaning of Section 2(11) of the Act, there are some facilities in which the HAT would have supervisory authority over as many as 100 WTLs and technicians. Although only a secondary indicia of supervisory status and not dispositive, this resulting supervisor-to-employee ratio would militate toward a finding of supervisory authority within meaning of Section 2(11) of the Act.

IV. CONCLUSION

Based upon the evidence described above, it is concluded that both the HATs and WTLs are supervisors within the meaning of Section 2(11) of the Act and therefore should be excluded from the bargaining unit found to be appropriate.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by International Brotherhood of Teamsters, Local 135 a/w International Brotherhood of Teamsters.

VI. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of

voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, on or before **June 22, 2006**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by **June 29, 2006**

SIGNED at Indianapolis, Indiana, this 15th day of June, 2006.

/s/ Rik Lineback

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